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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RAYMOND MICHAEL HENNINGS,<br><br>Defendant and Appellant. | B285376<br><br>(Los Angeles County Super. Ct. No. MA069021) |

THE COURT:

Raymond Michael Hennings appeals the judgment entered following the entry of a no contest plea for which he obtained a certificate of probable cause. Pursuant to the negotiated disposition, defendant pled no contest to two counts of attempting to dissuade a witness in violation of Penal Code[1] section 136.1, subdivision (a)(2) and admitted a prior strike conviction. (§§ 667,

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[1] Undesignated statutory references are to the Penal Code.

subds. (b)–(i), 1170.12, subds. (a)–(d).) Thereafter, in accordance with the plea agreement, the trial court sentenced defendant to serve 32 months in state prison, consisting of the lower term of 16 months on count 2, doubled to 32 months for the prior strike, and a concurrent lower term sentence of 16 months on count 3. The trial court dismissed the remaining counts and allegations.

Defendant obtained a certificate of probable cause to "appeal all matters pertinent to *Kellett v. Superior Court* (1966) 63 Cal.2d 822" (*Kellett*) and appealed the judgment. We appointed counsel to represent defendant on appeal. After examination of the record, counsel filed an opening brief raising no issues and asking this court to independently review the record. Defendant filed his own supplemental brief, in propria persona.

Defendant contends that because the evidence underlying the charges of dissuading a witness in this case was presented as evidence of consciousness of guilt in a prior prosecution for robbery, the prosecution of this case was barred under section 654 and *Kellett*. We disagree.

## FACTUAL BACKGROUND

*Los Angeles County Superior Court Case No. MA066955*[2]

Defendant was charged with robbing Jane Doe at knifepoint in September 2015, in Case No. MA066955. The court

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[2] Information regarding Case No. MA066955 is drawn from defendant's "Motion to Dismiss Under Penal Code section 654 and *Kellett v. Superior Court* (1966) 63 Cal.2d 822" and the People's opposition to that motion.

issued a protective order against defendant, and held defendant to answer. While he was in custody awaiting trial, defendant wrote numerous letters to Jane Doe and mailed them to her home address in violation of the protective order. Defendant also made nine phone calls to Jane Doe from jail, which he attempted to conceal by using other inmates' booking numbers to place the calls. In some of the letters and phone calls defendant sought to dissuade Jane Doe from testifying at trial.

On January 6, 2016, Jane Doe turned over to the district attorney 14 letters she had received from defendant since he had been in custody. On June 16, 2016, the prosecutor learned of and received the recordings of the jailhouse phone calls from defendant to Jane Doe. At trial, which commenced on June 20, 2016, the prosecution presented some of the letters and phone calls to support an inference of consciousness of guilt for the robbery of Jane Doe. Defendant was convicted of robbery (among other charges), and sentenced to 21 years in state prison.

*The jailhouse phone calls underlying counts 2 and 3 in the present case*

A phone call defendant made from jail to Jane Doe on October 24, 2015, at 8:49 a.m. was the basis for count 2. In that call appellant said, " 'Okay, honey. Please don't hurt me. Don't hurt me. You know I'm fighting for my life, don't ya? I want you to soften your—I want your heart to be softened. I want you to soften your heart and forgive me and don't come against me. Please don't come against me.' " Later in the same call defendant "basically said, 'Please don't help them put me in prison.' "

Count 3 was based on a phone call defendant made from jail to Jane Doe on November 1, 2015, at 9:50 p.m. In that phone call defendant told Jane Doe, " 'Don't tell anyone I'm sending you

letters, not the police, not even the—my investigator. Don't tell anyone I'm calling you on the phone, not even my investigator.' " He went on to say, " 'In order for them to give me any time, [Jane Doe] will have to come to Lancaster and testify against me. [Jane Doe] will have to testify against me. If she doesn't testify against me, they can't get me, but if she does go to Lancaster and testify against me, then I will get life in prison.' " Later in the call defendant told Jane Doe, " 'Don't go to court because it's my life in the balance. . . . You don't go to the court.' " Finally, defendant said, " 'Just let this thing die down, and I'm going to get out, . . . You have to help me here, [Jane], period. If you don't come—if you don't help me, I could be in a lot of trouble.' "

**DISCUSSION**

On appeal as in his motion to dismiss, defendant contends the failure to join the charges of attempting to dissuade a witness with the robbery count in Case No. MA066955 barred the subsequent prosecution of the present case under section 654 as interpreted by *Kellett*, *supra*, 63 Cal.2d 822. We review any factual determinations by the trial court under the deferential substantial evidence standard, while reviewing de novo the legal question of whether section 654 applies to bar prosecution of the instant case. (*People v. Valli* (2010) 187 Cal.App.4th 786, 794 (*Valli*).)

Section 654 addresses multiple prosecutions as well as multiple punishments, providing in relevant part: "[a]n acquittal or conviction and sentence under any one [provision of law] bars a prosecution for the same act or omission under any other." Our Supreme Court has explained that the preclusion of multiple prosecutions is separate and distinct from the prohibition on multiple punishments. (*Neal v. State of California* (1960) 55

Cal.2d 11, 21 (*Neal*); *Valli*, *supra*, 187 Cal.App.4th at p. 794.) Thus, while "the purpose of section 654 is to ensure that a defendant's punishment will be commensurate with his culpability" (*People v. Correa* (2012) 54 Cal.4th 331, 341), " '[t]he rule against multiple prosecutions is a procedural safeguard against harassment and is not necessarily related to the punishment to be imposed; double prosecution may be precluded even when double punishment is permissible.' " (*Valli,* at pp. 794–795, quoting *Neal*, at p. 21.)

In *Kellett* the defendant was charged in municipal court with the misdemeanor of exhibiting a firearm in a threatening manner. After the preliminary hearing, he was charged in superior court with the felony of possession of a firearm by a felon. Both charges arose from defendant's act of standing on a public sidewalk with a pistol in his hand. (*Kellett*, *supra*, 63 Cal.2d at p. 824.) Considering the multiple prosecution prong of section 654 along with the scope of mandatory joinder of related offenses in a single prosecution under section 954, the high court determined that the two offenses were too "interrelated" to permit separate prosecution. (*Kellett,* at pp. 826-827; *People v. Linville* (2018) 27 Cal.App.5th 919, 930 (*Linville*).) In so holding, *Kellett* announced the following rule: When "the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." (*Kellett,* at p. 827, fn. omitted; *Valli*, *supra*, 187 Cal.App.4th at

pp. 795–796.) The high court explained that such a rule of joinder not only prevents harassment, but also "avoids needless repetition of evidence and saves the state and the defendant time and money." (*Kellett*, at p. 826, fn. omitted.)

The *Kellett* rule applies only where the same act or course of conduct is central to more than one offense being charged; that is, the offenses must be transactionally related in order to invoke *Kellett*. (*Valli*, *supra*, 187 Cal.App.4th at p. 796.) In *People v. Britt* (2004) 32 Cal.4th 944 (*Britt*), the defendant, who was subject to mandatory sex offender reporting requirements, committed two crimes by moving between two counties without notifying law enforcement officials in the county of either his former or new residence. (*Britt*, at pp. 949–950, 952.) After his conviction in the county of his former residence for violation of the mandatory reporting requirements under former section 290, subdivision (f)(1), the defendant was prosecuted in the county of his new residence for violation of the reporting requirements under former section 290, subdivision (a). Applying the "same . . . course of conduct" standard, *Britt* held that section 654 prohibited successive prosecutions for the two violations of the reporting requirements based on a single act—one change of residence. (*Britt*, at p. 954.) Although the two offenses were distinct, the court found that "a single unreported move within California . . . played a significant part in both omissions." (*Ibid*.)

Following *Kellett*, appellate courts have adopted two different tests to determine whether the same course of conduct resulted in multiple offenses. (*Valli, supra,* 187 Cal.App.4th at p. 797.) "Under one line of cases, multiple prosecutions are not barred if the offenses were committed at separate times and locations. . . . [¶] A second version of the test—the 'evidentiary

test'—looks to the evidence necessary to prove the offenses. [Citation.] '[I]f the evidence needed to prove one offense necessarily supplies proof of the other, . . . the two offenses must be prosecuted together, in the interests of preventing needless harassment and waste of public funds.' [Citation.] 'The evidentiary test . . . requires more than a trivial overlap of the evidence. Simply using facts from the first prosecution in the subsequent prosecution does not trigger application of *Kellett*.' (*Valli, supra,* 187 Cal.App.4th at p. 799.)" (*People v. Ochoa* (2016) 248 Cal.App.4th 15, 28–29; *Linville*, *supra*, 27 Cal.App.5th at p. 931.)

Defendant contended below that the presentation of any evidence against him in one criminal prosecution foreclosed later use of the same evidence in another prosecution. But it is clear that the instant case presents nothing more than a "trivial overlap of the evidence," and therefore fails to meet the evidentiary test for application of the *Kellett* rule. Although the People presented evidence that defendant had attempted to dissuade Jane Doe from testifying at the trial on the robbery charge, such evidence was offered only to show a consciousness of guilt. The evidence essential to prove robbery—a " 'felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear' " (§ 211; *People v. Williams* (2013) 57 Cal.4th 776, 786)—did not require proof of any attempt to dissuade a witness, nor did evidence regarding defendant's attempts to talk Jane Doe out of testifying establish any element of the robbery.

The trial court correctly concluded that the successive prosecution of defendant's violations of section 136.1, subdivision

(a)(2) were not barred under *Kellett*, and properly rejected defendant's argument that evidence presented for any purpose in one prosecution cannot be used to prove the commission of another offense in a separate prosecution. As one appellate court has explained, "evidence is merely proof of a fact, and a fact may be introduced into any proceeding to which it appropriately relates. To prove a fact the same evidence may be introduced in any number of proceedings, civil or criminal, in which the fact is relevant and material to any issue in the case." (*People v. Douglas* (1966) 246 Cal.App.2d 594, 597 [successive prosecution for robberies permitted where evidence of robberies admitted in murder trial to show motive and transcript of some testimony from murder trial relating to robberies introduced in subsequent robbery trial]; *Valli*, *supra*, 187 Cal.App.4th at p. 799.) In sum, defendant's actions cannot be characterized as part of a single continuing incident that supplied proof of the robbery and dissuading a witness offenses. Accordingly, neither section 654 nor *Kellett* bars the subsequent prosecution under section 136.1, subdivision (a)(2).

Based on our examination of the entire record we affirm the judgment of conviction, and find that no other arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

**DISPOSITION**

The judgment is affirmed.

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LUI, P.J. ASHMANN-GERST, J. HOFFSTADT, J.